

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISIONS III and IV

CACR08-301

November 5, 2008

ALFRED M. ANDRADE

APPELLANT

APPEAL FROM SEBASTIAN
COUNTY CIRCUIT COURT, FORT
SMITH DIVISION [NO. CR-05-1494]

V.

HON. J. MICHAEL FITZHUGH,
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant was convicted of felony nonsupport of his minor child, a violation of Ark. Code Ann. § 5-26-401(a) (Supp. 2007), and was sentenced to a term of imprisonment to be followed by suspended imposition of an additional term of imprisonment. After appellant was released from prison, the State filed a petition to revoke his suspension, alleging that appellant had failed to comply with the terms and conditions thereof by again failing to pay any child support. The trial court found that appellant inexcusably failed to comply with the terms of his release and sentenced him to four years' imprisonment. Appellant argues that this finding is not supported by substantial evidence. We affirm.

In revocation proceedings, the State bears the burden of proving by a preponderance of the evidence that the defendant has inexcusably violated a condition of his suspension. *Jones v. State*, 52 Ark. App. 179, 916 S.W.2d 766 (1996). Where the sufficiency of the evidence is challenged on appeal from an order of revocation, we will not reverse the trial

court's decision unless its findings are clearly against the preponderance of the evidence; in making our review, we defer to the superior position of the trial court to determine questions of credibility and the weight to be given to the evidence. *Id.*

Appellant does not challenge the sufficiency of the evidence to prove that he failed to pay child support as ordered between the time of his release from prison in March 2007 until November 13, 2007, when the revocation hearing was held. Instead, appellant argues that the evidence is insufficient to show that his failure to pay was willful. We do not agree.

In the absence of a determination that the failure to pay is willful, a probationer cannot be punished by imprisonment solely because of a failure to pay. *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997). However, imprisonment is proper in cases where it is shown that the probationer failed to make bona fide efforts to pay or to obtain employment in order to pay. *Bearden v. Georgia*, 461 U.S. 660 (1983). Here, appellant, a forty-six-year-old man with a GED, testified that he failed to pay or obtain employment because he was in poor health. He stated that he suffered from congestive heart failure and Parkinson's disease, that he was therefore unable to work, and that he was attempting to qualify for disability benefits. The only corroboration for this testimony was a handwritten note on a torn prescription pad from the Bull's Gap Medical Clinic. The note, dated May 16, 2007, stated that appellant was currently unable to work because he was undergoing tests to determine the severity of his Parkinson's disease and congestive heart failure, and was signed by a person purporting to be a nurse-practitioner.

We note that appellant has the equivalent of a high-school education and that he is only forty-six years of age. We further note that, although appellant claims to have neither income nor disability benefits, he is by his own admission adequately housed and fed. Finally, we note that the trial judge had an opportunity to observe appellant's apparent state of health at the hearing. Even were we to credit the authenticity of the note submitted by appellant, his failure to produce any further documentation of his diagnosis and test results casts doubt on the veracity of his testimony. In making our review, we defer to the superior position of the trial court to determine questions of credibility and the weight to be given to the evidence, *Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004), and we cannot on this record say that the trial court was required to find that appellant was so physically disabled that his failure to pay was other than willful.

Affirmed.

GLADWIN, HEFFLEY, and BAKER, JJ., agree.

HART and HUNT, JJ., dissent.

HUNT, J., dissenting. I dissent from the majority's opinion affirming the trial court's revocation of appellant's suspended imposition of sentence (SIS) for failure to pay child support because there was no evidence that indicated that his failure to pay was willful or inexcusable. Appellant was sentenced to four years' imprisonment following his November 13, 2007, revocation hearing. At the hearing, appellant conceded that he had not made his court-ordered payments. However, appellant testified that he had suffered two heart attacks and was taking nitrates. Appellant also had Parkinson's disease. According to appellant, despite his health

condition, he had applied for several jobs. Appellant stated that employers were afraid to hire him when they learned that he was taking nitrates. Appellant introduced a letter from Marsha Montemarano, a nurse practitioner, indicating that he was undergoing tests to determine the severity of his congestive heart failure and Parkinson's disease. Appellant contends on appeal that the State failed to show by a preponderance of the evidence that he *willfully* and *inexcusably* failed to pay the full amount of child support. I agree.

A trial court may revoke a defendant's SIS at any time prior to the expiration of the period of SIS if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of SIS. Ark. Code Ann. § 5-4-309(d) (Repl. 2006). The State has the burden of proving that appellant violated the terms of his probation or suspended sentence by a preponderance of the evidence. *Williams v. State*, 351 Ark. 229, 91 S.W.3d 68 (2002).

Where the alleged violation is a failure to make payments as ordered, the State has the burden of proving by a preponderance of the evidence that the failure to pay was *inexcusable*. *Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988) (emphasis added). Once the State has introduced evidence of non-payment, the burden of going forward shifts to the defendant to offer some reasonable excuse for his/her failure to pay. *Id.* Arkansas Code Annotated section 5-4-205(f)(3) (Repl. 2006) sets forth several factors to be considered by the trial court, including the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay. There is no indication that the trial court found appellant's testimony incredible, nor is there a finding that appellant's failure to pay was willful or inexcusable.

The State failed to present any proof to rebut appellant's evidence that he was unable to earn money to pay his court-ordered support. Accordingly, there is no evidence that appellant's failure to pay was either willful or inexcusable. Therefore, I respectfully dissent.

HART, J., joins in this dissent.